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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT KALEOALOHA WILSON, Defendant and Appellant.	A152208 (Solano County Super. Ct. No. VCR224872)

A jury convicted defendant Robert Kaleoaloha Wilson of misdemeanor trespass and second degree burglary. On appeal, defendant challenges his burglary conviction, contending the trial court prejudicially erred by telling the jury that defendant's act in "changing the locks" on the house defendant claimed to have rented constituted theft. He urges reversal of his burglary conviction on the ground the court's comments impermissibly directed a verdict on that count. We conclude otherwise and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with assault upon a peace officer (Pen. Code,[1] § 245, subd. (c), count 1), resisting an executive officer (§ 69, count 2), misdemeanor trespass (§ 602, subd. (m), count 3), and first degree residential burglary (§ 459, count 4). The jury hung on counts 1 and 2 and convicted defendant on counts 3 and 4, finding the burglary charged in count 4 was of the second degree. Counts 1 and 2 were dismissed,

[1] All further statutory references are to the Penal Code.

and the trial court suspended imposition of sentence and placed defendant on formal probation for a term of three years. Defendant appeals the second degree burglary conviction.

The evidence at trial pertaining to the charged burglary established the following.[2]

In 2006, Hiep Tran moved into a house in Vallejo (the Locust Street house) that she purchased from Katherine Cavanaugh. In August 2012, Tran's house was broken into while she was away. Concerned for her safety, she started staying at a friend's home. Tran did not give anyone permission to live in the house and did not rent it out.

In October 2012, Tran discovered that defendant had moved into her house. The lock on the front door had been changed, and the side gate was locked even though Tran had never put a lock on it. On October 17, 2012, the police forcibly removed defendant from the house and placed him under arrest. That evening, Tran inspected the house. She found that several doors had been damaged; door locks and door knobs had been removed and placed in plastic bags; and new locks had been installed. Tran's possessions had been moved to the garage, and the house contained property that was not hers. Missing from the house were a ladder, wine, purses, jewelry, an electronic notebook, and a small laptop, the total value of which was estimated to be about $1,000.

Other evidence established that on two separate earlier occasions, defendant was living in houses in Vallejo that he did not own or rent. In August 2012, defendant occupied a vacant home that he falsely claimed to have rented from the man selling the home (the Valley Oak house). In September 2012, he was forced to vacate a home after falsely claiming he was leasing the home from the previous owner (the Woodbridge house).

Defendant and his wife each took the stand and testified that they and their son moved into the Locust Street house under a lease that the wife had negotiated with Katherine Cavanaugh. They moved the prior occupant's things into the garage, changed

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[2] At trial, both sides presented evidence concerning the police's forcible removal of defendant and another male from the Locust Street house. We omit discussion of such evidence because the counts based on the events of the removal are not at issue here.

the locks, and cleaned up the property both inside and out. On October 17, 2012, the police forcibly removed defendant from the house.

Defendant and his wife testified they leased the Valley Oak house from a person who misrepresented that he was the owner. Defendant claimed he leased the Woodbridge house from a woman who had sold it to a new owner. Defendant was told to vacate the premises.

DISCUSSION

On appeal, defendant acknowledges it was possible that the jury could have found him guilty of burglary if it found that he had changed the locks to Tran's house, and that he entered the house with the intent to change those locks. Defendant contends, however, that the trial court told the jury his act in changing the locks constituted theft and thereby directed a verdict on the burglary count. Based on this reasoning, defendant seeks reversal of his burglary conviction.

To resolve defendant's claims, we start with the well-settled principles below.

Article VI, section 10 of the California Constitution provides in relevant part: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." As the California Supreme Court explains, this "constitutionally endorsed form of assistance to jurors" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 767) is a " 'powerful judicial tool [that] may sometimes invade the accused's countervailing right to independent jury determination of the facts bearing on his guilt or innocence.' " (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1218.) Because an accused is entitled to a jury finding beyond a reasonable doubt on every element of a charged offense, such commentary must be " 'accurate, temperate, nonargumentative, and scrupulously fair' " and may not " 'withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.' " (*Ibid*.) These limitations apply no matter how overwhelmingly the evidence may point to the defendant's guilt. (*United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 572–573; see *People v. Moore* (1997) 59 Cal.App.4th 168, 181.) "The propriety and

prejudicial effect of a particular comment are judged both by its content and the circumstances in which it was made." (*People v. Melton* (1988) 44 Cal.3d 713, 735.) As a procedural matter, a specific and timely objection is required to preserve a claim of improper judicial commentary for appellate review, unless an objection could not have cured the resulting prejudice or would have been futile. (*People v. Monterroso* (2004) 34 Cal.4th 743, 781 (*Monterroso*).)

We now turn to the relevant facts and circumstances.

Before closing arguments, the trial court instructed the jury consistently with the standard pattern instructions for burglary. Specifically, the court instructed that to prove defendant is guilty of burglary, the People must prove: (1) the defendant entered a residence, and (2) when he entered the residence, he intended to commit theft or another felony therein. (See CALCRIM No. 1700.) The court clarified that for burglary, the defendant did not need to have actually committed theft, as long as he entered with the intent of doing so, and the People did not have to prove that the defendant actually committed theft. To assist the jury in deciding whether defendant intended to commit theft, the court instructed that establishing a theft requires proof that: (1) the defendant took possession of property owned by someone else; (2) the defendant took the property without the owner's consent; and (3) when the defendant took the property, he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of that property. (See CALCRIM No. 1800.)

During closing arguments, defense counsel objected when the prosecutor made the following references to the evidence relevant to the burglary count. After noting Tran's "shock" when her key to the Locust Street house did not work, the prosecutor argued: "Well, that's because the defendant changed the locks. And that's a theft because he took off the original locks that belonged to Ms. Tran, and he put on his own locks so no one else would have access to the place. That includes Ms. Tran, the lawful homeowner. You're going to see photographs." A little later, the prosecutor argued: "So it's clear that the defendant made a theft here. He made a theft when he took these doorknobs,

these locks off of the house that belonged to Ms. Tran so only he would have access to it, and Ms. Tran would have no access to her home. In a way, the defendant stole the entire home from Ms. Tran. Still later, the prosecutor argued: "Now, *in addition to the actual theft of the house*, you also heard from Ms. Tran that she had multiple items missing—" (Italics added.)

The defense timely objected to each of these three arguments on the ground it misstated the law. The first two times, the trial court overruled the objection without comment. When counsel objected to the third argument, noted in italics above, the court did not rule on the objection but instead addressed the jury: "I have given you the instructions on the law. The instruction—the definition of burglary involves entry and an intent to take property, a theft in addition to that. Occupying the space is not a theft of something. It's occupancy of a space. However, the taking of a lock could be a theft. Taking of other property, that [the prosecutor] is discussing right now, taking any of that property, taking the paperwork could be a theft." The defense did not object to the court's comments, though they are the focus of defendant's appeal. Thereafter, the prosecutor continued with the following argument: "So what I'm arguing to you is that not only did the defendant steal the lock from the front door which gave Ms. Tran access to her home, that was a way that the defendant intended to deprive Ms. Tran of access to her home, by changing the locks. [¶] There was [sic] also missing items. And you've also heard from Ms. Tran that these items included a ladder. They included laptops. They included computers. They included bottles of wine. There were several jackets, clothing, watches and jewelry. And she said these items were never recovered."

Once closing arguments concluded, the trial court admonished the jury that "[t]he two things your decision should be based on is [sic] the evidence that is admitted here in trial and the law that I have instructed you on. [¶] Again, don't take anything I said or did during this trial as an indication of what I think about the facts, the witnesses or what your verdict should be. That is your decision. Not mine." (See CALCRIM No. 3530.)

For the reasons below, we conclude the challenged judicial comments were not improper and do not warrant a reversal of defendant's burglary conviction.

Preliminarily, we observe defendant failed to make a specific and timely objection to the trial court's comments. Because there is no basis for supposing that an objection would have been either ineffective or futile, defendant has forfeited review of the claim that the comments directed a verdict on the burglary count. (*Monterroso*, *supra*, 34 Cal.4th at p. 781.)

In any event, the claim lacks merit. The trial court's comments fell far short of expressly or impliedly directing the jury to find that defendant had stolen Tran's locks or anything else belonging to Tran.[3] When the defense objected to the second of the prosecution's two statements that defendant committed a theft of Tran's house,[4] the court addressed the point by reminding the jury of the definition of burglary and by clarifying—without making any reference to defendant—that occupancy of a space is not a theft of something but that the taking of tangible property such as a lock or paperwork "could be" a theft. The challenged comments did not advocate or otherwise suggest a view that defendant had stolen or committed theft of Tran's house, or the locks, or any of the other items mentioned in the prosecution's argument. Instead, they were consistent with "the trial court's legitimate role" of "assisting the jury's understanding of the evidence." (*People v. Hawkins* (1995) 10 Cal.4th 920, 948 (*Hawkins*).)

Moreover, when considered in context with the court's instructions on the proof required for a conviction of burglary and its post argument admonishments regarding the jury's duty to render a verdict based solely on the evidence and not on anything the court might have said, the challenged comments could not have usurped or infringed upon the jury's ultimate factfinding power. (See *Hawkins*, *supra*, 10 Cal.4th at p. 948.)

The situation here is akin to that in *People v. Linwood* (2003) 105 Cal.App.4th 59, in which the defendant similarly challenged certain judicial comments as unfairly

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[3] Defendant does not appear to contend that a burglary or a theft cannot occur when locks and knobs are taken off the doors to a house and does not offer any authorities for that proposition. Nor does he dispute that substantial evidence supports his burglary conviction.

[4] On appeal, the People acknowledge that defendant could not have committed theft on the theory that he stole the house from Tran.

emphasizing, and thereby suggesting the court's belief in, the prosecution's case. (*Id*. at p. 73.) In *Linwood*, after the conclusion of closing arguments, the trial court sought to clarify for the jury which of the alleged acts were applicable to which of the separate counts against the defendant, while also stating it was for the jury to decide if a crime had been committed. (*Id*. at p. 72.) There, as here, the trial court did not comment upon the guilt of the defendant but merely discussed and analyzed the evidence in an impartial and instructive manner. (*Id*. at p. 74.) And similarly, the jury there was instructed that the trial court had not intended by anything it said or did to suggest what the jury should find as to the facts. (*Ibid*.) Just as *Linwood* found the trial court's comments were appropriate to "clear up possible jury confusion" and did not invade the province of the jury (*ibid*.), we find the same conclusion is warranted here.

Defendant's authorities do not persuade us otherwise. Significantly, they all involve instructions or comments that could reasonably be understood by a jury as removing an element of the charged offense from its consideration. For example, in *People v. Figueroa* (1986) 41 Cal.3d 714, which involved a prosecution for sale of unqualified securities in violation of the Corporations Code, the trial court did not instruct on the statutory definition of a security but instead told the jury that the promissory notes involved in the subject transactions were securities for purposes of the statute. (*Figueroa*, at p. 723.) The prosecution also emphasized to the jury that, pursuant to the court's instruction, the promissory notes were securities as a matter of law and that the jury need not consider the question. (*Id*. at pp. 723–724.) Although *Figueroa* determined the trial court erroneously removed an element of the charged offense from the jury's consideration (*id*. at p. 741), the facts there bear no similarity to the situation here. Likewise, in *People v. Nava* (1989) 207 Cal.App.3d 1490, the trial court instructed the jury that a bone fracture constituted a significant or substantial physical injury within the meaning of Penal Code section 12022.7. (*Nava*, at p. 1494.) While *Nava* acknowledged that a broken bone such as the one allegedly caused by the defendant might be a great bodily injury, it found the trial court committed reversible error by removing that

determination from the jury. (*Id*. at pp. 1498–1499.) The trial court's comments in *Nava* stand in sharp contrast to the court's comments here.

United States v. Murdock (1933) 290 U.S. 389 also fails to aid defendant's position. There, after correctly instructing the jury that whatever the court may say as to the facts was only its view and could be entirely disregarded, the court proceeded to erroneously express its opinion that the government had sustained its burden in proving that the defendant was guilty as charged beyond a reasonable doubt. (*Id*. at pp. 393–394.) The egregious facts in *Murdock* plainly offer no parallel to those in the instant case.

Finally, defendant offers a litany of other complaints against the trial court: it micromanaged the case from beginning to end; its questions and lectures to counsel and defendant reflected a set and obvious interpretation of the case; its apology to the jury for the slow progress of the case made clear it was disappointed in the conduct of the attorneys and their management of the case; it questioned defendant on the stand so extensively that defense counsel moved for a mistrial; it incorrectly sustained prosecutorial objections to certain of defense counsel's questions and closing arguments; it disregarded proper procedure by responding to jury questions without consulting counsel for either side; after the verdicts were rendered, it admonished defendant for being dishonest at trial; and at sentencing, it expressed profound disappointment at defendant's failure to be honest with his probation officer.

To the extent defendant contends the foregoing actions of the trial court, whether considered singly or in combination, constituted judicial error, misconduct, or bias warranting reversal, he fails to provide supporting authorities or any meaningful legal analysis, and we consider the contentions waived. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) We have, however, reviewed the record and do not agree with defendant's assessment that the trial court, by virtue of the complained-of actions, acted as a second prosecutor and tipped the needle in favor of the People when it commented to the jury that the taking of a lock or paperwork or other property "could be" a theft.

DISPOSITION

The judgment is affirmed.

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Fujisaki, Acting P. J.

WE CONCUR:

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Petrou, J.

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Wiseman, J.*

A152208

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.